IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.410 OF 2000

...

M/s.Prabhat General Agencies
and ors. ...Petitioners

v/s.

Karnataka Bank Ltd. & Anr. ...Respondents

...

Mr.D.D.Madon with Mr.Shrikant Shah and Ms.Sheetal Shah i/b Mehta & Girdharlal for the Petitioners.

Mr.Umesh Shetty i/b Umesh Shetty & Co. for the Respondents.

...

CORAM: D.K.DESHMUKH, J.

DATED: 10TH JANUARY,2006

P.C.:

1. By this petition the Petitioners challenge the award made by the sole arbitrator directing the Petitioners to pay certain amount to the Respondent/bank.

2. Before me the award has been challenged only on two grounds (i) the learned arbitrator had, on commencement of Recovery of Debts due to Banks and Financial Institutions Act, 1993, no jurisdiction to give the award and (ii) as the Petitioner No.6 was a minor when the agreement of guarantee was entered into as also agreement of arbitration was entered into, the award could not have been made against the Petitioner No.6.

3. So far as the first contention is concerned, following can be taken as admitted position:-

(i) That the Respondent Karnataka Bank Ltd. is a bank within the meaning of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "DRT Act".

(ii) The amount for recovery of which reference was made to the learned arbitrator was a debt to the Respondent Bank within the meaning of DRT Act, though the time when the reference was made the D.R.T. Act was not in force.

(iii) That during the pendency of the arbitral proceedings, the DRT Act became applicable.

(iv) That though the Petitioners did not appear before the learned arbitrator, they had written a letter to the learned Arbitrator pointing out that due to the provisions of D.R.T.Act, the learned Arbitrator does not have the jurisdiction to continue the arbitral proceedings.

(v) That the arbitrator who has made the award would be an authority within the meaning of Section 18 of the D.R.T.Act.

4. On the basis of these admitted position, the learned Counsel appearing for the Petitioners submits that the learned Arbitrator has held that he will continue to have the jurisdiction to go on with the arbitration proceedings which were pending on the date on which the D.R.T. Act has become applicable, because Section 31 of the D.R.T. Act does not make the provisions for transfer of proceedings pending before the Arbitrator to the D.R.T. constituted under the D.R.T.Act, and that because the civil court continues to have the jurisdiction to entertain the suits for recovery of amount due to financial institutions which are less than Rs.10 lakh, the jurisdiction of the D.R.T. is not exclusive. The learned Counsel submits that the Supreme Court by its judgment in the case of Allahabad Bank v/s. Canara Bank & Anr., AIR 2000 SC 1535, has in terms held that **the jurisdiction of the D.R.T. is exclusive. The learned Counsel, therefore, relied on the judgment of the Supreme Court in the case of** Natraj Studio Pvt. Ltd. v/s. Navrang Studio & Anr, AIR 1981 SC 537, **submits that as the jurisdiction of the D.R.T. is exclusive, the arbitrator will not have the jurisdiction to go on with the arbitration proceedings. The learned Counsel relying on the**

judgment of the Supreme Court in the case of United Bank of India v/s. Abhijit Tea Co.Pvt. Ltd. & Ors, 2000 (6) Scale 283 submits that merely because there **is no provision made in Section 31 for transfer of the proceedings pending before the arbitrator, on the date on which the provisions of D.R.T.Act became applicable, it cannot be inferred that the arbitrator will continue to have the jurisdiction to make the award.**

5. The learned Counsel appearing for the Respondent/bank on the other hand, relying on amended definition of the term "Debt" found in Section 2 (g) of the D.R.T. Act submits that the arbitration award can be made even in relation to the debts which are due to the financial institution. The learned counsel also relies on the provisions of Section 31(1) to submit that the arbitration proceedings can go on even after the provisions of D.R.T.Act become applicable. The learned Counsel also relies on the observations found in paragraph 16 of the judgment of the Division Bench of this Court in the case of Mr.Saurabh Kalani v/s. Tata Finance Ltd. & Anr., 2003(4) All MR 117. Paragraph 16 reads as under:-

16. It is to be noted that the legislature in introducing the aforesaid amendment has used the work "suit" only and not "suit and other proceedings". The word "suit" has not been defined in SICA nor any extended meaning of the word suit has been given under any other provisions of the said Act. In Bouvier's Law Dictionary, 3rd Revision (1984) Volume-1, the word "arbitration" has been defined at page 225 of the Book as follows:-

"Arbitration is the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called arbitrators, or reference."

"An arbitration is a domestic tribunal created by the will and consent of the parties litigant, and resorted to avoid expense, delay and ill-feeling consequent upon litigating in Courts of Justice."

> **Arbitration is thus a substitution by consent of the parties of another tribunal for those provided by the ordinary process of law. It is an arrangement for taking and abiding by the judgment of the selected persons in some disputed matter, instead of carrying it to the established tribunal of Justice and is intended to avoid the formalities, the delay, the expense and vexation ordinary litigation.**

6. Now the decision of the learned Arbitrator on the question of jurisdiction is contained in paragraph 4 of the award. Paragraph 4 reads as under:-

> **4. Though the Respondents have not cared to file Reply and, therefore, strictly it is not necessary even to consider what has been stated in the letter written by the Advocate for Respondents from time to time, it would be advisable to deal with the two contentions briefly. The first contention is that in view of the establishment of Debt Recovery Tribunal the dispute cannot be adjudicated by the Arbitrator. The contention is devoid of any merit. The establishment of Debt Recovery Tribunal does not completely take away the jurisdiction of even High Court to hear the claims. The High Court retains the jurisdiction to hear the claims of**

> **financial institution for value of more than Rs.10 lakhs. The establishment of the Tribunal requires transfer of proceedings pending in the Court and where the claim is more than Rs.10 lakhs to the Tribunal. The Debt Recovery Act nowhere provides that the proceedings before the Arbitrator stands terminated and/or automatically transferred to the Debt Recovery Tribunal. It would always be open, even after the establishment of the Debt Recovery Tribunal, for the parties to enter into arbitration agreement and refer the dispute to the Arbitrator. There is no compulsion that the financial institutions like Banks and the customer who has taken loan must only approach the Debt Recovery Tribunal for redressal of their grievances. Only in case where the parties have not entered into agreement that the proceedings are required to be adopted before the Debt Recovery Tribunal, provided the claim is above Rs.10 lakhs. It is obvious that the contention of the Respondents on this count is without any substance. The Respondents did not choose to file Reply and raise the question of jurisdiction of arbitration proceedings, even when the Arbitration Act specifically provides that the Arbitrator has to determine the question of jurisdiction.**

7. Perusal of the above quoted paragraph of the award shows that according to the learned arbitrator, his jurisdiction to entertain the arbitral proceedings continues even after the provisions of the D.R.T. Act become applicable. Firstly, because the jurisdiction of the D.R.T. is not exclusive, in the sense, that even after the commencement of the D.R.T.Act, civil court can

entertain the claim made by financial institution, where the amount to be recovered is less than Rs.10 lakh. Secondly, because Section 31 of the D.R.T. Act does not contemplate transfer of proceedings pending before the arbitrator to the D.R.T. Thirdly, D.R.T.Act does not have the provision which says that on commencement of the Act, the arbitral proceedings shall stand terminated.

8. So far as the first reason given by the learned Arbitrator is concerned, the matter is no more res-integra. The Supreme Court in its judgment in the case of Allahabad Bank referred to above, after considering the provisions of D.R.T. Act has observed thus in paragraph 21 and 23 of its judgments:-

> **21. In our opinion, the jurisdiction of the Tribunal in regard to adjudication is exclusive. The RDB Act requires the Tribunal alone to decide applications for recovery of debts due to Banks or financial institutions. Once the Tribunal passes an order that the debt is due, the Tribunal has to issue a certificate under Section 19(22) (formerly under Section 19(7)) to the Recovery Officer for recovery of the debt specified in the certificate. The question arises as to the meaning of the word 'recovery' in Section 17 of the Act. It appears to us that basically the Tribunal is to adjudicate the liability of**

the defendant and then it has to issue a certificate under Section 19(22). Under Section 18, the jurisdiction of any other Court or authority which would otherwise have had jurisdiction but for the provisions of the Act, is ousted and the power to adjudicate upon the liability is exclusively vested in the Tribunal. (This exclusion does not however apply to the jurisdiction of the Supreme Court or of a High Court exercising power under Article 226 or 227 of the Constitution). This is the effect of Sections 17 and 18 of the Act.

23. Even in regard to 'execution', the jurisdiction of the Recovery Officer is exclusive. Now a procedure has been laid down in the Act for recovery of the debt as per the certificate issued by the Tribunal and this procedure is contained in Chapter V of the Act and is covered by Sections 25 to 30. It is not the intendment of the Act that while the basic liability of the defendant is to be decided by the Tribunal under Section 17, the Banks/Financial institutions should go to the Civil Court or the Company Court or some other authority outside the Act for the actual realisation of the amount. The certificates granted under Section 19(22) has, in our opinion, to be executed only by the Recovery Officer. No dual jurisdictions at different stages are contemplated. Further, section 34 of the Act gives overriding effect to the provisions of the RDB Act. That section reads as follows:-

"Section 34(1): Act to have overriding effect-

(1) Save as otherwise provided in sub-section (2), the provisions of this Act shall effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

> **(2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984) and the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986)."**
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> **The provisions of section 34 (1) clearly state that the RDB Act overrides other laws to the extent of inconsistency'. In our opinion, the prescription of an exclusive Tribunal both for adjudication and execution is a procedure clearly inconsistent with realisation of these debts in any other manner.**

9. It is clear from the observations of the Supreme Court quoted above that the Supreme Court has clearly held that the jurisdiction of D.R.T. to decide application made by financial institution for recovery of debt is exclusive. As now the Supreme Court has held that the jurisdiction of the D.R.T. to entertain applications filed by the financial institution for recovery of debt is exclusively, then applying the law laid down by the Supreme Court in its judgment in the case of Natraj Studio (P) Ltd. v/s. Navrang Studios and anr. referred to above, **which is in relation to the provisions of the**

Small Causes Court and Bombay Rent Act, it has to be held that as the jurisdiction of the D.R.T. is exclusive, the jurisdiction of the arbitrator to entertain the reference on the question which is exclusively within the jurisdiction of the D.R.T. Act is outsted. The Supreme Court in paragraph 24 of the its judgment in Natraj Studio's case has observed thus:-

> **24. In the light of the foregoing discussion and the authority of the precedents we hold that both by reason of S.28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 and by reason of the broader considerations of public policy mentioned by us earlier and also in Deccan Merchants Co.operative Bank Ltd. v/s. M/s.Dalichand Jugraj Jain (AIR 1969 SC 1320), the Court of Small Causes has and the Arbitrator has not the jurisdiction to decide the question whether the respondent-licensor-landlord is entitled to seek possession of the two studios and other premises together with machinery and equipment from the appellant-licensee-tenant. That this is the real dispute between the parties is abundantly clear from the petition filed by the respondents in the High Court of Bombay, under Section 8 of the Arbitration Act seeking a reference to Arbitration. The petition refers to the notices exchanged by the parties, the respondent calling upon the appellant to hand over possession of the studios to him and the appellant claiming to be a tenant or protected licensee in respect of the studios. The relationship between the parties being that of licensor-landlord and licensee-tenant and the dispute between them relating to the possession of the**

> licensed-demised premises, there is no help from the conclusion that the Court of Small Causes alone has the jurisdiction and the Arbitrator has none to adjudicate upon the dispute between the parties.

10. In view of the law laid down by the Supreme Court in its judgment in Allahabad Bank's case and in Natraj Studio's case, it is clear that as the jurisdiction of the D.R.T. is exclusive, the arbitrator will cease to have the jurisdiction to entertain the dispute in relation to the matters which are within the exclusive jurisdiction of the D.R.T. In its judgment in the case of Allahabad Bank the Supreme Court in fact, after referring to various provisions of the D.R.T. Act, has held that as a result of Section 18 and Section 34(1) of the D.R.T. Act all courts and authorities which had jurisdiction before the commencement of the Act to entertain the disputes which are within the exclusive jurisdiction of the D.R.T. cease to have the jurisdiction.

11. So far as second reason given by the learned arbitrator is concerned, the Supreme Court has considered that question in its judgment in the case of United Bank of India referred to above. The

observations of the Supreme Court in paragraphs 21 and 26 of it judgment are relevant. They read as under:-

> **21. In some statutes the legislature no doubt says that no suit shall be 'entertained' or 'instituted' in regard to a particular subject matter. It has been held by this Court that such a law will not affect pending actions and the law is only prospective. But, the position is different if the law states that after its commencement, no suit shall be 'disposed of' or 'no decree shall be passed' or 'no court shall exercise powers or jurisdiction'. In this class of cases, the Act applies even to pending proceedings and has to be taken judicial notice of by the civil Courts.**
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> **26. That principle has been applied to this very Act by this Court recently in Allahabad Bank vs. Canara Bank (JT 2000(4) SC 411). If the said principle is applied, it is clear that the provision in section 31 must be construed in such a matter that, after the Act, no suit by the Bank is decided by the civil Court and all such suits are decided by the Tribunal.**

12. It is clear from the provisions of Sections 17 & 18 that after the provisions of D.R.T. Act are applicable, all courts and authorities lose the jurisdiction to entertain claims which are within the exclusive jurisdiction of the D.R.T. The arbitrator would also lose his jurisdiction to continue with the arbitral proceedings. In that

case, the arbitrator will have to discontinue the proceedings leaving the finacial institution to its remedy before the D.R.T. for recovery of the debts.

13. So far as third reason given by the learned arbitrator is concerned, in my opinion, in view of the judgment of the Supreme Court in the case of Allahabad Bank, it can no more be said that there is no specific provisions in the D.R.T. Act ousting the jurisdiction of the arbitrator to continue with the arbitral proceedings. Thus, in my opinion, the Petitioner is right in submitting that on commencement of the D.R.T. Act, the learned arbitrator lost jurisdiction to continue with the arbitral proceedings, and therefore, for this reason the award is liable to be set aside.

14. So far as next submission which was urged by the learned Counsel appearing for the Petitioner about the minority of the Petitioner No.6 is concerned, it appears that an agreement has been signed on behalf of the Petitioner No.6 by his natural guardian. The question whether the agreement signed by the natural gurdian on behalf of

the Petitioner No.6 would be binding on the Petitioner No.6 is concerned, it is a question of fact which is required to be raised by the parties by appearing before the arbitral tribunal. Admittedly, the Petitioner No.6 did not appear before the arbitral tribunal. In this view of the matter, therefore, in my opinion, this contention cannot be entertained here. It appears that the guardian will be entitled to enter into an agreement on behalf of the minor. The only requirement that will have to be satisfied would be that the contract should be for the benefits of the minor whether the contract is entered into by the guardian for the benefits of the minor or not is essentially a question of fact and therefore, it is required to be raised before the arbitrator. As the Petitioners have admittedly not appeared before the arbitrator, in my opinion, the Petitioners can not be allowed to raise that contention for the first time here.

15. In my opinion, in view of the provisions of Section 34 read with sub-section (3) of Section 31 of the Arbitration & Conciliation Act, it is clear that the D.R.T. Act has overridding effect and hence arbitration proceedings cannot be taken up or

contined in relation to matters which are in the exclusive jurisdiction of the D.R.T.

15. In the result, therefore, petition succeeds and is allowed. The Award impugned in the petition is set aside. However, there shall be no order as to costs. In case there are any interim orders presently operating made on the basis of the award, which is set aside, they will continue to operate for a period of eight weeks from today.

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